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No. 85-768

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JAMES A. LEONE, *et al.*,

Petitioners,

vs.

PIERCE COUNTY MEDICAL BUREAU, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The Ninth Circuit Court Of Appeals

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Are the Plaintiff Chiropractors (Petitioners) entitled to a judgment of liability for violations of Section 1 of the Sherman Act in the absence of any showing that the activities of the Defendant Medical Bureaus had any adverse impact upon competition?

2. Are the Plaintiff Chiropractors entitled to a judgment of liability for violations of Section 1 of the Sherman Act in the absence of any showing of the fact of damage with respect to any of the Plaintiffs?

PARTIES TO THE PROCEEDINGS

Respondents confirm that Petitioners have correctly identified the parties to the proceedings in their Petition.

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Respondents, all of the Medical Bureaus named as Defendants in the above-captioned action, respectfully submit this Brief in opposition to the Petition for Certiorari filed by the Plaintiff Chiropractors, and urge this Court to deny the petition.

OPINIONS BELOW

Petitioners correctly identified the opinion of the Ninth Circuit Court of Appeals, which opinion was reproduced as an Appendix to their petition. However, Petitioners are incorrect in stating that there was no written decision from the Trial Court. On November 23, 1984, the Trial Court entered Findings Of Fact And Order Of Dismissal With Prejudice, and on that same date entered a Judgment dismissing the action. Copies of these two documents are attached to this Brief as Appendices "A" and "B" respectively.

JURISDICTION

The Petitioners correctly cite the statutory authority under which this Court may review a decision of the Ninth Circuit Court of Appeals by writ of certiorari. However, the Respondents respectfully suggest that this Court lacks jurisdiction because the requirements of Rule 17 of the Supreme Court Rules, no matter how liberally interpreted, are not satisfied by this case.

STATEMENT OF THE CASE

1. Course Of Proceedings Below.

The complaint in this action alleges violations of Section 1 of the Sherman Act (15 USC § 1) and was filed pursuant to Section 4 of the Clayton Act (15 USC § 15). The Trial Court had jurisdiction under 28 USC §1337. The Court of Appeals had jurisdiction under 28 USC §1291 because the Findings Of Fact And Order Of Dismissal With Prejudice and the accompanying Judgment were a final order and judgment disposing of all claims of all parties.

Plaintiffs James A. Leone and other chiropractors (herein referred to as "Petitioners" or as "Chiropractors") filed this action against Defendants Pierce County Medical Bureau, Thurston County Medical Bureau, Cowlitz Medical Service, Kitsap Physician Service and Washington Physician Service (herein collectively referred to as "Respondents" or as "Bureaus"). The Complaint was filed on December 14, 1983, and an Amended Complaint adding additional Plaintiffs was filed on January 13, 1984. The parties conducted substantial merit discovery, and ultimately lodged an Agreed Pre-Trial Order on September 7, 1984.

At a pre-trial conference held on September 27, 1984, the Chiropractors took the position that, based solely on the structure of the various Bureaus and the contents of the policies for pre-paid health services which those Bureaus sold, the Chiropractors were entitled to judgment of liability as a matter of law, with only damages to be tried. In addition, counsel for the Chiropractors asserted that if they were not entitled to judgment, their claims should be dismissed with prejudice.

Accordingly, on October 3, 1984, the Chiropractors filed what they captioned a Motion For Judgment On Stipulated Record. On October 4, 1984, the Bureaus filed a Motion For Judgment Of Dismissal With Prejudice Or In The Alternative For Summary Judgment, together with a Memorandum supporting that motion and opposing the Chiropractors' motion. The Bureaus never stipulated to any of the facts advanced by the Chiropractors, nor was there in actuality any "Stipulated Record" presented to the Trial Court. Rather, the Bureaus accepted as true, for purposes of these

motions only, the facts relied upon by the Chiropractors and all reasonable inferences which could be drawn from those facts.

On October 5, 1984, the Trial Court heard argument on the motions and orally announced that the Bureaus' motion to dismiss was granted because the Chiropractors had failed to establish any evidence of an impact on competitive conditions. (Appendix to Petition for Certiorari, at V.) It was this decision by the Trial Court dismissing the Chiropractors' claims which was affirmed by the Ninth Circuit Court of Appeals, and which the Chiropractors are now asking this Court to review.

2. Statement Of Facts.

As is readily apparent from the foregoing, the facts in this case have never been litigated. If that were to become necessary, most of the facts represented by the Chiropractors would be vigorously disputed by the Bureaus. It is only in the context of the Chiropractors' Motion For Judgment, and the Bureaus' counter-motion for dismissal, that the Bureaus have elected not to dispute the facts relied upon by the Chiropractors before the Trial Court.

The facts as presented to the Trial Court are not entirely consistent with the facts set forth in the Chiropractors' Petition for Certiorari. Moreover, both at the Trial Court level and in the Petition for Certiorari, the Chiropractors tend to blur the distinction between the facts and those inferences, both reasonable and unreasonable, which they believe should be drawn from the facts. These problems are even more severe than one might expect because the Chiropractors' Petition for Certiorari is replete with factual errors

and genuinely incomprehensible statements. Consequently, it is incumbent upon the Bureaus in this response to set forth what they believe the facts presented to the Trial Court to have been.

The respondent Bureaus are five of some eighteen medical bureaus operating in the State of Washington. All of the various medical bureaus are "health care service contractors" which have been established under, and are operated and subject to regulation under, the laws of the State of Washington. As "health care service contractors," each Bureau is in the business of selling prepaid health-care services to interested groups and individuals.

The Bureaus compete for customers with a myriad of other health-related organizations, including other physician organizations, employer-sponsored programs and private insurance companies. Competition in this area has become increasingly intense, and the Bureaus, though reasonably successful, have witnessed a steady erosion of their market share. In 1980, all eighteen of the medical bureaus, considered together, served only 25 percent of the population of the State of Washington, and that percentage has been declining steadily ever since. The individual Bureaus named as defendants in this action covered between 18 percent and 38 percent of the population in their respective service areas in 1980; again, in every instance these percentages have declined steadily and consistently since 1980.

Although the Bureaus do compete with private insurance companies and other entities, it is important to recognize that the Bureaus are not insurance companies themselves. Rather than insuring against specific risks, as a conventional insurance company would

do, the Bureaus sell a package of specific prepaid health-care services. The distinction between insuring risks and selling services is important to an understanding of this litigation, and is a direct outgrowth of the structure of the Bureaus themselves.

The members of the Bureaus are physicians, both doctors of medicine and doctors of osteopathy. The evidence developed by the Chiropractors clearly demonstrated that the physicians founded and continued to participate in the Bureaus in order to enhance the demand for, and thus their ability to sell, their own services. They also sought a means of insuring that consumers would continue to have reasonable access to medical care. The member physicians have agreed that they will provide all covered services to all subscribers, and that they will accept whatever payment is made by the Bureau as payment in full for those services. This places the physicians directly "at risk", because they must provide services whether or not the Bureau is able to pay for those services in full, or at all.

It is reasonable to infer from these facts that the Bureaus were established to facilitate competition between the member-physicians and other health care providers, and that the Bureaus themselves have facilitated competition among health-care service contractors and private insurance carriers. It is not reasonable—indeed, in the complete absence of any other evidence it is patently unreasonable—to infer from these facts that the member physicians have acted to exclude competitors from access to the market or to accomplish any other anticompetitive goal.

Perhaps the best evidence that the Bureaus have not engaged in exclusionary activity is the extent to

which they have offered and sold chiropractic coverage. There are two types of group contracts, or policies, offered by each of the Bureaus. First are "experience-rated" contracts, typically with very large groups. Under these contracts, the specific services covered and the extent of coverage are negotiated directly between the group and the Bureau, and the premiums charged are determined (or "rated") based on the actual claims experience of the specific group involved. A substantial number of the experience-rated contracts sold by the Bureaus, including all such contracts covering state employees, contain chiropractic coverage as a basic benefit.

The second type of group policy comprises "community-rated" contracts. These are standard form contracts which are not typically negotiated. Rather, the purchaser of a "community-rated" contract can vary the coverage purchased by buying or rejecting various optional riders offered by the Bureau. The premium for any particular group purchasing a "community-rated" contract is determined with reference to the claims experience of the entire community of persons covered by this type of contract. The premiums for the riders are determined from experience with claims made under the riders, and from the Bureaus' estimates of what the cost of paying future claims will be. All purchasers of community-rated contracts interested in chiropractic coverage can elect an optional rider for such coverage.

The Chiropractors make much of the fact that the basic benefits of community-rated contracts do not include chiropractic coverage. Though true, the fact is meaningless in the context of this case. All of the Bureaus have offered optional chiropractic riders to

purchasers of their community-rated contracts, and a significant number of the purchasers of those contracts have elected to acquire chiropractic coverage. Indeed, the percentage of Bureau subscribers who have chiropractic coverage of one form or another is substantial, ranging to as high as 75 percent. The only reasonable inference to be drawn is that the Bureaus have made a good faith attempt to sell chiropractic coverage at a reasonable, competitive price. As the Ninth Circuit recognized, any other inference would have to be based upon the assumption that the purchasers of the chiropractic riders were "acting irrationally," because no one would purchase the rider unless there were an "economic justification for the price differential between basic coverage and coverage with chiropractic benefits." (Appendix to Petition for Certiorari at III).

When viewed in the context of the market in which the Bureaus compete, and the structure of the individual Bureaus themselves, it becomes apparent that none of the evidence adduced by the Chiropractors supports their claims of anticompetitive activity. In actuality, the only reasonable inference to be drawn from the facts is that the Bureaus have been vigorous competitors, and that their efforts to remain viable participants in this market have lead them to increase their offerings of chiropractic coverage.

There is one final aspect of the record presented to the Trial Court which requires discussion, that being the complete absence of evidence pertaining to damages. There is nothing in the record upon which the Chiropractors purport to rely which establishes that any one of the petitioners, or any other chiropractor for that matter, has suffered any damage of

any sort whatsoever. There was no evidence, empirical, anecdotal or otherwise, suggesting that a single patient elected to forego a visit to a chiropractor because of policy terms or any activities on the part of any one or more of the Bureaus. Thus, there is absolutely no showing that the "trade or commerce" of the Chiropractors has been affected by anything the Bureaus have done.[1]

REASONS FOR DENYING THE WRIT

1. Summary Of Analysis And Arguments.

It is abundantly clear, from the foregoing descriptions of the proceedings below and of the facts, that this case does not present any questions appropriate for review and resolution by this Court. Under the circumstances of this case, the only question presented is whether a judgment for violation of the Sherman Act could be upheld in the absence of proof of impact on competitive conditions and the absence of proof of fact of damages. The Bureaus submit that

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[1]The Chiropractors made a belated attempt, after this case had been argued to the Ninth Circuit Court of Appeals, to rely upon the deposition testimony of their expert as evidence of damages. However, the expert simply prepared calculations which showed that the Chiropractors would have made more money if they had had more patients. The expert did not show that the number of patients seen by the Chiropractors had been reduced by anti-competitive activities of the Bureaus, or by any deviation from competitive market conditions. To the contrary, he specifically acknowledged that the prices at which the Bureaus sold their chiropractic riders were reasonable in light of the information available to the Bureaus. Obviously, the expert's testimony does not establish either the fact of damage or any impact on competitive conditions, and the Chiropractors did not tender any other evidence to establish damages.

the answer to this question is self-evident, and that it does not warrant consideration by this Court.

The questions which the Chiropractors claim are presented by this case simply do not arise. There is no antitrust significance to the alleged exclusion of chiropractors from membership in the Bureaus, nor to the alleged exclusion of chiropractors from participating in the various contracts, absent proof that these exclusions had any impact on the ability of chiropractors to compete for patients. Both the Trial Court and the Ninth Circuit Court of Appeals concluded that no such impact had been shown, and the Chiropractors have not raised any challenge to these holdings in the questions presented by their Petition for Certiorari.

There is no conflict whatsoever between the decision of the Ninth Circuit Court of Appeals in this action, and the decision of the Fourth Circuit Court of Appeals in *Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia*, 624 F.2d 476 (4th Cir.), cert. denied, 450 U.S. 916 (1980). Similarly, there is no conflict whatsoever between the decision of this Court in *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 102 S.Ct. 2540, 73 L.Ed.2d 149 (1982), and the decision of the Ninth Circuit Court of Appeals at issue here. Indeed, it is difficult to see how the decision in *McCready* has any bearing whatsoever on the disposition of this case, and the logic employed by the Fourth Circuit in the *Virginia Academy* decision is completely consistent with the analysis of this case by the Ninth Circuit. Clearly, the Chiropractors have not even remotely satisfied the requirements of Rule 17 of the Supreme Court Rules. Therefore, it is neither necessary nor appropriate for

this Court to grant the Chiropractors' Petition for Certiorari.

2. This Case Does Not Raise Any Of The Questions Petitioners Seek To Have Reviewed, And Does Not Pose Any Question Appropriate For Resolution By This Court.

The questions which the Chiropractors purportedly want this Court to review are simply not presented by the record in this case. Because of the unusual procedures adopted by the Chiropractors' counsel, this case was submitted to the Trial Court and reviewed by the Court of Appeals on a somewhat sketchy factual record. The Ninth Circuit, in a carefully reasoned opinion by Judge Wallace, properly considered and disposed of the arguments the Chiropractors advanced on appeal. Those arguments having failed, the Chiropractors now pose three new questions for review by this Court, but these questions seem to have at best only a tenuous relationship to the issues in this case.

The first of the Chiropractors' questions is whether exclusion of chiropractors from membership in the Bureaus is a violation of the Sherman Act. The only "trade or commerce" of chiropractors is the trade of their patients. Consequently, there can be no restraint of that trade subject to redress under the Sherman Act unless the Chiropractors can demonstrate that their access to patients has been affected. There was absolutely no evidence tendered by the Chiropractors showing any causal connection between membership in the Bureaus and access to patients. This fatal deficiency in the Chiropractors' case was recognized by

the Court of Appeals, when it concluded that there had been no showing of competitive injury. (Appendix to Petition for Certiorari, at IV.)

The Chiropractors do not raise any issue in their petition for certiorari regarding this conclusion by the Court of Appeals. Rather, the Chiropractors seem to be arguing that the mere exclusion of chiropractors from membership in the Bureaus, without more, constitutes a *prima facie* case of a violation of the Sherman Act. This assertion is incorrect for at least two reasons. First, it fails to recognize that the fact of damage is an essential element to any action for violation of the Sherman Act. *See, e.g., Northwest Publications, Inc. v. Crumb*, 752 F.2d 473 (9th Cir. 1985). Second, it presumes the applicability of the *per se* rule in circumstances where this Court has made it clear the rule does not apply. *See, e.g., Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, ___ U.S. ___, 105 S.Ct. 2613 (1985); *NCAA v. Board of Regents*, ___ U.S. ___, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984). In the absence of any evidence that exclusion from membership has impacted the Chiropractors' ability to compete for patients, the alleged exclusion has no antitrust significance whatsoever. Thus, the first question the Chiropractors pose is not raised by the record.

The second question stated by the Chiropractors in their petition is whether exclusion of chiropractors from participation under the Bureaus' contracts is violative of the Sherman Act. This question, like the first, is simply not raised by the record in this action. In the first place, the Chiropractors' assertion that they have been excluded from participation is grossly

inaccurate. Chiropractic coverage is available to all subscribers and beneficiaries under all contracts covering state employees, under a substantial number of the other experience-rated contracts, and under a substantial number of community-rated contracts. Moreover, all of the Bureaus have offered chiropractic coverage to all purchasers of group policies. Therefore, to the extent the Chiropractors are not able to participate under a particular contract, it is because the group purchasing that contract elected not to purchase chiropractic services.

The second defect in this question is identical to the fatal deficiency in the Chiropractors' first question. That is, exclusion from participation, even if it occurred, would have no antitrust significance at all unless it were shown that this exclusion had an adverse impact upon the Chiropractors' ability to compete for patients. There has been no evidence adduced by the Chiropractors which would support the conclusion that their access to patients has been impaired. Therefore, even if exclusion from participation were admitted or proved, it would not raise any antitrust issue in the context of this case.

Finally, even if one were to assume, in the complete absence of evidence, that access to some patients has been affected by the Bureaus' activity, there has been no showing that such an effect would be significant. The policies sold by all medical Bureaus in the aggregate cover less than 25 percent of the population of the State of Washington. Thus, the access of chiropractors to the remaining 75 percent cannot possibly be affected by anything the Bureaus do. All Bureau contracts covering state employees include chiropractic coverage as a basic benefit, and thus chi-

ropractors' access to this substantial pool of patients is unaffected by anything the Bureaus do. A significant number of the experience-rated groups covered by Bureau contracts, and a substantial number of community-rated groups, have elected chiropractic coverage. Thus, the chiropractors' access to these patients is unimpaired by the Bureaus' activities.

In short, the only pool of patients the Chiropractors could conceivably have been denied access to are the members of groups which deliberately chose not to purchase chiropractic coverage. Even there, the Chiropractors would be affected only if members of such a group decided against seeing chiropractors solely because it was not a covered benefit. The Chiropractors made no attempt whatsoever to prove that any significant number of people fell into this category, and thus did not even attempt to prove that the activities of the Bureaus, even if assumed to be anticompetitive, had any significant impact upon market conditions. Again, the Chiropractors apparently are attempting to invoke the *per se* rule in the absence of any evidence of damages, and in the absence of any evidence showing that either of the alleged exclusionary practices had any anticompetitive effect. This attempt must be rejected.

The argument the Chiropractors seem to be advancing is closely analogous to that rejected by this Court in *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, ___ U.S. ___, 105 S. Ct. 2613, 53 U.S.L.W. 4733, 4737 (1985), where the Court concluded that application of the *per se* rule to an alleged boycott would be appropriate only upon a showing that the activity complained of "falls into a category likely to have predominantly anticompetitive

effects." In the instant case, the Chiropractors have not demonstrated that exclusion from membership or the alleged exclusion from participation in Bureau contracts has had any effect whatsoever upon competition. This failure of proof is, in and of itself, sufficient to demonstrate the specious nature of the Chiropractors' argument. When combined with the complete absence of probative evidence pertaining to damages, it compels the conclusion that the Chiropractors' action was properly dismissed.

As was true with the first two questions posed by the Chiropractors in their petition, their third question attempts to raise issues which are not involved in this litigation and have no antitrust significance. The third question purports to be whether the Bureaus' refusal to pay for "covered dysfunctions" is a violation of the antitrust laws. This question can most charitably be characterized as misleading, because the question itself is based upon a patently distorted presentation of the record. The Chiropractors are well aware that there is no such thing as a "covered dysfunction" because the Bureaus do not insure against, or "cover", risks or "dysfunctions". Rather, as discussed in some detail above, the Bureaus sell pre-paid *services*. It is self-evident from a review of the Petition for Certiorari that the Chiropractors are well aware of this distinction. In fact, when it suited their purpose to do so, the Chiropractors made it very clear to the Court of Appeals, and the Trial Court, that the Bureaus were not insurers of risks.[2] Thus, the

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[2]The Chiropractors are forced to resort to this type of specious argument because there is no factual basis for their claim that the Bureaus have refused to make payments required by their policies. The Bureaus do make payments for chiropractic services

Chiropractors' third question clearly does not arise on the record of this case.

In actuality, there is only one question which this Court could review if certiorari were granted. That question is whether the Chiropractors should be permitted to obtain a judgment of liability for an alleged violation of the Sherman Act without proving any impact on competition and without proving even the fact of damages. This question, of course, answers itself. It has become a truism of antitrust law that the fact of damages is an essential element of any claim under the Sherman Act, and it is equally well established that the purpose of the antitrust laws is to protect competition, not competitors. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977).

The Chiropractors have chosen to ignore these well-established precepts of antitrust law, as can be seen by examining what the Chiropractors chose *not* to ask this Court to review. They did not raise, as a question presented by their Petition for Certiorari, the propriety or accuracy of the Court of Appeals' conclusion that no impact on competitive conditions had been shown. Similarly, they do not question the conclusion

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when those services are covered by a particular policy. In other words, for those subscribers who have elected to purchase prepaid chiropractic services, the Bureaus pay for the services as rendered. The Chiropractors are, in actuality, complaining about the fact that the Bureaus do not pay for services which are *not* covered by their contract. It is doubtful that a limitation of payments to those required by a contract could ever give rise to antitrust liability. It is a foregone conclusion that no such liability can attach when, as here, there is no evidence whatsoever of any impact on competitive conditions.

below that proof of market structure is essential to establishing their claim, nor the conclusion that no probative evidence of market structure had been presented. By choosing to ignore these critical aspects of the decisions below, the Chiropractors demonstrate beyond dispute that they have no genuine antitrust issues for this Court to review.

When stripped of all its verbiage, the Petition for Certiorari asks this Court to determine that an association of physicians, in and of itself, is a *per se* violation of the Sherman Act. Moreover, the Chiropractors have chosen to ask the Court to make that determination in the absence of any showing of an impact on trade or commerce. There is no basis whatsoever in law or logic for the Chiropractors' arguments, and this Court should deny the petition.

3. There Is No Conflict Between The Decision Of The Court Of Appeals And Any Decision Of This Court.

In their attempt to invoke the jurisdiction of this Court under Rule 17, the Chiropractors claim that there is an irreconcilable conflict between the decision of this Court in *Blue Shield of Virginia v. McCready*, *supra*, and the decision of the Ninth Circuit Court of Appeals in this action. However, no such conflict exists. As the Court is well aware, the decision in *McCready* dealt with the standing of an individual subscriber to bring an antitrust claim, and did not even purport to address the merits of that claim.[3]

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[3]The bankruptcy of the Chiropractors' argument is overwhelmingly demonstrated by the source of the supposed conflict. The Chiropractors rely exclusively upon footnote 4 in the *McCready*

Thus, the decision by the Ninth Circuit Court of Appeals that the Chiropractors here failed to make out a *prima facie* case of a Sherman Act violation cannot possibly be considered inconsistent with a determination by the Supreme Court on the standing of individual subscribers.

4. There Is No Conflict Between The Decision Of The Ninth Circuit Court Of Appeals In This Case And Any Decision Of Any Other Circuit Court Of Appeals.

The second prong of the Chiropractors' attempt to invoke Rule 17 of the Supreme Court Rules is their assertion of a conflict between the decision of the Ninth Circuit in the instant case and the decision of the Fourth Circuit in *Virginia Academy of Clinical Psychologists*, *supra*. Contrary to the Chiropractors' assertions, however, the facts before the Fourth Circuit are vastly different from those presented to the Ninth Circuit, and the cases are thus readily distinguishable. Moreover, the reasoning employed by the Fourth Circuit, if applied to the facts in the instant

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decision, 457 U.S. at 69, 102 S.Ct. at 2543. That footnote is a description by this Court of the decision of the Fourth Circuit Court of Appeals in *Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia*, 624 F.2d 476 (4th Cir. 1980), *cert. denied*, 450 U.S. 916 (1981). The most that can be said about this footnote, in the context of the instant case, is that this Court might have been speaking approvingly of the decision of the Fourth Circuit. However, there is no explanation by the Chiropractors as to how an approving comment on one case, made by this Court in a second case, can even be considered a holding of the Court, let alone be deemed controlling on another Circuit in a third case.

case, would lead inexorably to the conclusion reached by the Ninth Circuit.

In *Virginia Academy of Clinical Psychologists*, the system being challenged was one which completely excluded psychologists from the defendants' pre-paid health services plan. The only time the plan would cover a psychologist's services was when the services were supervised by and billed through a physician. However, substantially similar services, if performed by a psychiatrist, did not require any such supervision because the psychiatrist was, by definition, a physician. Moreover, there were no alternatives available to consumers interested in psychologists' care, such as the optional riders offered by the Bureaus involved in this action. Thus, the physicians had absolute control over access to psychologists' services and consumer choice was completely stymied. Finally, the Fourth Circuit observed that the justification advanced by the Virginia plan for physician control of access to psychologists' services was on its face defective. None of these considerations, which lead to the Fourth Circuit's conclusion that the Virginia plan was an illegal restraint of trade, are present in the plans challenged by the Chiropractors.

As discussed at some length above, the Bureaus have offered and sold chiropractic coverage to a great number of their subscribers. Thus, there has been no exclusion of chiropractors from access to this pool of patients. Secondly, the Bureaus have, in fact, expanded consumer choice by offering chiropractic coverage as an optional rider. This makes the coverage available to those who want it, makes it possible for those who do not want chiropractic coverage to obtain policies without it, and avoids the problems of sub-

sidization of unwanted services which would occur if chiropractic services were a mandatory basic benefit in all policies.

Finally, the record presented to the Trial Court clearly demonstrates that one of the reasons the Bureaus elected not to include chiropractic services in the basic coverage of their policies was their concern that utilization would generate a substantial cost to the Bureaus which would have to be offset by a substantial premium increase. It was their business judgment that such a premium increase would substantially reduce their ability to compete with other entities, such as private insurance companies, in the industry. Conversely, sale of chiropractic services as an optional rider preserves their ability to compete for those groups which do not want these services while enhancing their ability to compete for the patronage of groups which do want chiropractic coverage. These are legitimate business concerns, far different from the sham justification advanced by the Virginia plan before the Fourth Circuit. In the complete absence of any evidence that the Bureaus' decisions had an impact on competitive conditions, it is, as noted by the Ninth Circuit, "'impossible to say" that the plan structure adopted by the Bureaus is "a restraint of trade and not a recognition of economic realities." (Appendix to Petition for Certiorari at III-IV).

A primary concern of the Fourth Circuit Court of Appeals was the adverse impact on consumer choice resulting from the Virginia plan. The Washington Bureaus' plans have exactly the opposite effect, significantly enhancing consumer choice. Thus, it is reasonable to believe that, if the Fourth Circuit were

considering this case, they would not only find the facts distinguishable from their earlier decision, but would reach precisely the same conclusion reached by the Ninth Circuit. Obviously, there is in actuality no conflict between the Circuits.

CONCLUSION

The Bureaus respectfully submit that the Chiropractors' Petition for Certiorari should be denied. The only question which the record could possibly present for review is one which this Court has already answered on numerous occasions, and which does not require any further consideration. The questions the Chiropractors purport to raise are not even remotely justified by the record. The Chiropractors failed to adduce any evidence suggesting that the Bureaus had impacted competitive conditions or had inflicted any damages upon any individual chiropractor. The absence of such evidence strips the questions the Chiropractors asked the Court to review of any antitrust significance whatsoever.

No matter how liberally the requirements of Rule 17 of the Supreme Court Rules might be interpreted, those requirements are not met here. There is no significant difference, and certainly no conflict, between the decision of the Ninth Circuit Court of Appeals and the decision of any other Court of Appeals. Similarly, there is no conflict between any decision of this Court and the decision of the Court of Appeals the Chiropractors seek to have reviewed. Under these circumstances, it is neither necessary nor appropriate for this Court to grant certiorari, and the Chiropractors' petition should be denied.

RESPECTFULLY SUBMITTED this 12th day of December, 1985.

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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON AT TACOMA

No. C83-845T

CHIROPRACTORS, JAMES A. LEONE AND JAMES A. LEONE, D.C. LTD. P.S., ET AL.
Plaintiffs,

VS.

PIERCE COUNTY MEDICAL BUREAU, ET AL.
Defendants.

LODGED
October 9, 1984

FINDINGS OF FACT AND ORDER OF DISMISSAL WITH PREJUDICE

THIS MATTER came before the Court on plaintiffs' Motion For Judgment On Stipulated Record and the defendants' Motion For Judgment Of Dismissal With Prejudice Or For Summary Judgment. Both motions were fully briefed, and oral argument was heard by the Court on October 5, 1984, all parties being represented by their respective counsel.

The Court, having considered the record before it and the briefs and arguments of counsel, makes the following findings of fact:

1. Plaintiffs made an offer of proof to the Court, and represented to the Court that this offer of proof contained all the evidence they would have presented

at trial. Plaintiffs further represented to the Court that, if this offer of proof did not make out a prima facie case of a violation of Section 1 of the Sherman Act, their claims should be dismissed. Plaintiffs' motion, and the responsive motion of defendants, were both predicated upon this representation as to the procedure being followed.

2. Because plaintiffs included in their offer of proof everything they intended to present at trial, plaintiffs come before the Court on these motions in exactly the same position they would have been in had they put on their case at trial and rested. Thus, the motion filed by plaintiffs is the equivalent of a motion for partial summary judgment, and the motion filed by the defendants is the equivalent of a motion for directed verdict filed at the close of plaintiffs' case.

3. The evidence put forth by plaintiffs fails to disclose any unreasonable impact on competitive conditions. That being the case, plaintiffs have failed to make out a prima facie case because they have failed to demonstrate the existence of all the elements of their cause of action. See *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978).

Therefore it is hereby

ORDERED as follows:

Pursuant to Rule 50(a), the motion of defendants shall be and the same hereby is GRANTED, and all claims of plaintiffs are hereby dismissed with prejudice.

DONE IN OPEN COURT this 23rd day of November 1984.

/s/U.S. District Court Judge

Presented by:

GORDON, THOMAS, HONEYWELL,
MALANCA, PETERSON & O'HERN
ALBERT R. MALANCA
JOHN C. GUADNOLA
KENNETH G. KIEFFER

By /s/ _____
Lead Counsel for All Defendants
Approved as to form:

WALLACE M. RUDOLPH AND
SCHWEINLER, LOWENBERG,
JOHNSON & LOPEZ

BY /s/ _____
ATTORNEYS FOR PLAINTIFFS

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA

Civil Action Docket No. C83-845T

CHIROPRACTORS, JAMES A. LEONE AND JAMES A. LEONE, D.C. LTD P.S., ET AL

VS.

PIERCE COUNTY MEDICAL BUREAU ET AL

LODGED
November 23, 1984

JUDGMENT

This action came on for hearing before the court, United States District Judge JACK E. TANNER presiding. The issues having been duly heard and a decision having been duly rendered, it is ordered and adjudged.

Pursuant to Rule 50 (a), the motion of defendants shall be and the same hereby is GRANTED, and all claims of plaintiffs are hereby dismissed with prejudice.

/s/ _____
BRUCE RIFKIN, CLERK
Deputy Clerk of the Court